STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Honorable Brian K. Zahra, Presiding

CARRIER CREEK DRAIN DRAINAGE DISTRICT, Plaintiff/Appellee, v LAND ONE, L.L.C., Defendant/Appellant. _____/	Supreme Court Docket No. 130125 Court of Appeals Docket No. 255609 Eaton County Circuit Court No. 03-67-CC
CARRIER CREEK DRAIN DRAINAGE DISTRICT, Plaintiff, v ECHO 45, L.L.C., Defendant/Appellant. _____/	Supreme Court Docket No. 130126 Court of Appeals Docket No. 255610 Eaton County Circuit Court No. 03-68-CC
CARRIER CREEK DRAIN DRAINAGE DISTRICT, Plaintiff, v LAND ONE, L.L.C., Defendant/Appellant, and STANDARD FEDERAL BANK, Defendant.	Supreme Court Docket No. 130127 Court of Appeals Docket No. 255611 Eaton County Circuit Court No. 03-69-CC

MICHIGAN ASSOCIATION OF REALTORS®' MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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NOW COMES *Amicus Curiae*, the Michigan Association of REALTORS® (the "Association"), by its attorneys, McClelland & Anderson, L.L.P., and pursuant to MCR 7.306(D), moves for leave to file a brief *amicus curiae* in support of the position of Defendants/Appellants, Land One, L.L.C. ("Land One") and Echo 45, L.L.C.'s ("Echo 45") Application for Leave to Appeal. In support of the instant Motion, the Association states as follows:

1. The Association is Michigan's largest nonprofit trade association, comprising 48 local boards and a membership of more than 33,000 brokers and salespersons licensed under Michigan law.

2. Each day, the Association's members are involved in hundreds of real estate transactions, involving property which is or may be affected by the actions of the literally thousands of Michigan governments, agencies, and other entities with the power of eminent domain.

3. The instant case is of vital concern to the Association and its members, as it involves a critical factor in the valuation of land taken in condemnation proceedings and protection of the constitutional right to just compensation, as well as the ability of property owners who receive offers from condemning agencies for their property and, without a professional appraisal, are unaware of all of the factors that may affect the value of their property.

4. More specifically, the Uniform Condemnation Procedures Act (the "UCPA"), MCL 213.55, first requires that a condemning agency provide a good faith written

offer to the owner for property the agency proposes to condemn. MCL 213.55(1). If an owner believes the good faith written offer did not include "one or more items of compensable property or damage for which the owner intends to claim a right to just compensation," the owner must file a written claim with the agency "for each such item." MCL 213.55(3).

5. Echo 45 did not submit a written claim in response to the offer tendered by the Carrier Creek Drain Drainage District ("Carrier Creek"). Echo 45 did dispute the amount of just compensation owed. Echo 45's appraiser based his valuation of the property on a highest and best use that included the possibility of rezoning.

6. The trial court granted a motion in limine filed by Carrier Creek to preclude consideration of the possibility of rezoning on the value of the real property to be taken. Accordingly, Carrier Creek and the trial court reasoned that compensation could not include any value attributable to the consideration of the possibility of rezoning. The Court of Appeals affirmed, reasoning that the possibility of rezoning is a form of "compensable damage," a loss, harm, or injury that is eligible for compensation and therefore must be disclosed by the owner to the condemning agency by written claim if not expressly part of the written good faith offer from the condemning agency.

7. Reading the statute to require notice of a claim in order to demonstrate the value of the property taken does not comport with the statute itself and would cause the statute to conflict with the Michigan and United States Constitutions. Under the guise of distinguishing the "plain meaning" of the statute, the lower court would deprive a property owner of the basic constitutional right to just compensation for property taken by the government. The only item of property taken here is the real property; the only damage at issue is the loss to the property owner

of the value of that same parcel of real property. Longstanding precedents interpreting the Michigan and United States Constitutions, as well as fundamental standards for appraisals, require the consideration of the possibility of rezoning in valuing real property. That consideration is part of the evaluation of the market for property for its highest and best use.

8. Issues of property value and property rights are an integral part of the daily work and interests of the Association and its members.

9. In its order entered June 9, 2006, this Court permitted the filing of supplemental briefs within 42 days of the date of the order.

10. The Association could, based upon the collective experience and expertise of its members, provide beneficial information to this Court in considering the issues presented by this case.

11. This Court is always desirous of having all the light it may have on the question before it. See, *Grand Rapids* v *Consumers Power Co*, 216 Mich 409, 415; 185 NW 352 (1921). Accordingly, the Association seeks leave to file a brief *amicus curiae* in support of the position of Land One and Echo 45's Application for Leave to Appeal.

12. The Association's proposed *amicus* brief accompanies this Motion.

WHEREFORE, the Association respectfully requests that this Court grant the Association leave to file the accompanying *Amicus* Brief in support of the position of Land One and Echo 45's Application for Leave to Appeal.

McCLELLAND & ANDERSON, L.L.P.
Attorneys for *Amicus Curiae*, Michigan Association of REALTORS®

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MICHIGAN ASSOCIATION OF REALTORS®' BRIEF *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF DEFENDANTS/APPELLANTS

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STATEMENT IDENTIFYING JUDGMENT APPEALED FROM

Amicus curiae, Michigan Association of REALTORS®, accepts the statement of Orders Appealed from and Relief Sought stated in Echo 45, L.L.C.'s Application for Leave to Appeal.

STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Amicus curiae, Michigan Association of REALTORS®, addresses only one of the questions presented for review in the Application for Leave to Appeal:

> DID THE LOWER COURTS ERR IN HOLDING THAT THE POSSIBILITY THAT ECHO 45, L.L.C.'S LAND MAY BE REZONED WAS AN "ITEM" OF PROPERTY OR DAMAGE SEPARATE AND DISTINCT FROM THE LAND ITSELF AND FOR WHICH THE OWNER MUST SUBMIT A WRITTEN CLAIM?
>
> The trial court answered "No."
>
> The Court of Appeals answered "No."
>
> The Drainage District answers "No."
>
> Echo 45, L.L.C. answers "Yes."
>
> *Amicus curiae*, Michigan Association of REALTORS®, answers "Yes."

STATEMENT OF FACTS

Amicus curiae, Michigan Association of REALTORS®, accepts Echo 45, L.L.C.'s statement of facts relevant to the question presented addressed.

STANDARD OF REVIEW

Amicus curiae, Michigan Association of REALTORS®, accepts Echo 45, L.L.C.'s statement of the standard of review applicable to this Application for Leave to Appeal.

INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Association of REALTORS® (the "Association") is Michigan's largest nonprofit trade association, comprising 48 local boards and a membership of more than 33,000 brokers and salespersons licensed under Michigan law.

Each day, the Association's members are involved in hundreds of real estate transactions, involving property which is or may be affected by the actions of the literally thousands of Michigan governments, agencies, and other entities with the power of eminent domain.

The instant case is of vital concern to the Association and its members, as it involves a critical factor in the valuation of land taken in condemnation proceedings and protection of the constitutional right to just compensation, as well as the ability of property owners who receive offers from condemning agencies for their property and who, without a professional appraisal, do not know all of the factors that may affect the value of their property.

More specifically, the Uniform Condemnation Procedures Act (the "UCPA"), MCL 213.55, first requires that a condemning agency provide a good faith written offer to the owner for property the agency proposes to condemn. MCL 213.55(1). If an owner believes the good faith written offer did not include "one or more items of compensable property or damage for which the owner intends to claim a right to just compensation," the owner must file a written claim with the agency "for each such item." MCL 213.55(3). If the owner fails to do so, the claim is barred.

Echo 45, L.L.C. ("Echo 45") did not submit a written claim in response to the offer tendered by the Carrier Creek Drain Drainage District (the "Drainage District"). Echo 45 did, however, dispute the amount of just compensation owed. Echo 45's appraiser based his valuation

of the property on a highest and best use for which the property could be used if there were a possibility of rezoning.

The trial court granted a motion in limine filed by the Drainage District to preclude consideration of the possibility of rezoning in the value of the real property to be taken. The Court of Appeals affirmed,[1] reasoning that the possibility of rezoning itself has a separate value and is a form of "compensable damage," a loss, harm, or injury that is eligible for compensation. Therefore, if it is not expressly part of the written good faith offer from the condemning agency, then the owner must make a written claim pursuant to MCL 213.55(3) or be foreclosed from recovering compensation for that "item."

Under the guise of distinguishing the "plain meaning" of the statute, the lower courts would deprive a property owner of the basic constitutional right to just compensation for property taken by the government. Although the opinion correctly defines the terms used in the statute, it misapplies them. The only item of property taken here is the land; the only damage at issue is the loss to the property owner of the value of that same parcel of real property. Longstanding precedents interpreting the Michigan and United States Constitutions, as well as fundamental real property and zoning law and standards for appraisals, require the consideration of the possibility of rezoning in valuing real property. That consideration is part of the evaluation of the market for property for its highest and best use.

Issues of property value and property rights are an integral part of the daily work and interests of the Association and its members.

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[1] *Carrier Creek Drainage District v Land One, LLC*, 269 Mich 324; 712 NW2d 168 (2005).

The Association could, based upon the collective experience and expertise of its members, provide beneficial information to this Court in considering the issues presented by this case.

This Court is always desirous of having all the light it may have on the question before it. See, *Grand Rapids* v *Consumers Power Co*, 216 Mich 409, 415; 185 NW 352 (1921). Accordingly, the Association seeks leave to file a brief *amicus curiae* in support of the position of Land One and Echo 45's Application for Leave to Appeal.

ARGUMENT

I. BACKGROUND

The rule sought by the Drainage District, sustained by the trial court and the Court of Appeals, expands the requirement of the written claim by a property owner under the UCPA beyond the confines of the statutory procedure to impinge on the valuation of a particular item of property, land in this case, required to ensure the constitutionally mandated "just compensation" for property taken for public use. Based on the reasoning of the Court of Appeals, and as defended by the Drainage District in its Response to the Application for Leave to Appeal, the written claim to be filed by the owner, where the condemning agency's offer has omitted an item of property or damage, would be expanded to cover the universe of facts that might be considered in valuing any item of property or damage.

The amendments to the UCPA in 1996, addressing the procedures for pre-condemnation offers by condemning agencies and the exchange of information on the property taken in a condemnation action, did not require the result reached by the trial court and Court of Appeals.

The Court of Appeals opinion misconstrues the statutory phrase "items of compensable property and damage" as "damages." This Brief addresses why the expansion of the claims requirement is ill-advised and unnecessary to protect condemning agencies.

There is an extensive body of case law that addresses the role of the possibility of rezoning in valuing property taken in a condemnation action. The law makes clear that the possibility of rezoning is an issue in determining the value of an item of property taken in the condemnation, not in itself, a separate item of property or of "damage." There is a separate question in this case, not addressed in this Brief, of whether there was a reasonable possibility of rezoning that

would affect the value of Echo 45's land. That question is distinct. Even if Echo 45's showing as to the possibility of rezoning was unconvincing, the trial court should have admitted that evidence and weighed it accordingly.

II. APPLICATION OF THE STATUTE

A. The Good Faith Offer and Claim for Omitted Items of Property or Damage

Prior to the commencement of this action, the Drainage District, by letter from its attorney, made its offer without elaboration or further explanation:

> Pursuant to the provisions of the Uniform Condemnation Procedures Act, and on behalf of the Carrier Creek Drainage District, I am authorized and make an offer of payment of $92,000 in exchange for your signature on the enclosed Warranty Deed. If you choose to accept this offer, please sign and return the Warranty Deed. For recording purposes, the Warranty Deed must be signed in the presence of two witnesses and a notary (the notary can serve as one of the witnesses).[2]

Echo 45 did not submit a written claim under MCL 213.55(3), but did not accept the amount offered for its land. After the Drainage District filed this action, Echo 45's real estate appraiser relied, in his opinion of the highest and best use for the land, on the possibility that the land could be rezoned for office use. The Drainage District filed a motion in limine seeking to preclude the admission of testimony regarding the possibility of rezoning on the grounds that the consideration of rezoning was "an item of compensable property or damage," and Echo 45 failed to provide the Drainage District with written notice of such claim pursuant to MCL 213.55(3) (the "Notice Statute"). The trial court granted the motion, and the Court of Appeals affirmed, holding

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[2]*See*, Attachment 1 to this Brief, Plaintiff's appendix to Memorandum of Law dated May 21, 2003.

that consideration of the possibility of rezoning requires prior notice to the condemning authority. 269 Mich App 324, 329; 712 NW2d 168, 172.

The Court of Appeals found that the statute, as amended in 1996, requires notice to the condemning authority of any omitted "compensable property" or "compensable damage," and,

> The plain and ordinary meaning of 'compensable damage' is loss, harm, or injury that is eligible for compensation.

269 Mich App at 329; 712 NW2d at 172. As Echo claimed it "was deprived of the increased value associated with the possible zoning change . . . , " according to the Court of Appeals, "Echo intended to claim a right to just compensation for the loss of the value of the possibility of rezoning . . ." (emphasis supplied). Thus, the Court concluded, "it is clearly a claim for compensable damage that was required, under MCL 213.55(3), to be disclosed within the time limits set forth in the statute." *Id.*

The opinion of the Court of Appeal artificially and erroneously separates "the possibility of rezoning" as a distinct form of substantive injury or damage and thereby mischaracterizes the consideration of existing and possible uses of land and existing and possible land use regulations in arriving at just compensation for the property taken by the government. In so doing, the Court of Appeals misconstrues the measure of damages for property or injury as substantive damage or injury.

The "possibility of rezoning" is not property or substantive damage or injury. Therefore, the Notice Statute does not require that the owner whose land is taken give notice to the condemning agency or be barred from introducing it as a consideration in the value of the land. Accordingly, the decisions of the courts below should be reversed.

This conclusion rests on a solid foundation in the law of just compensation. An examination of that law and the statute at issue make clear that the 1996 statutory amendment did not change the rules applicable to the valuation and recovery of just compensation for land taken by a condemning agency.

B. JUST COMPENSATION

The applicable fundamental law of condemnation in Michigan is set forth in Constitution 1963, Art. 10, sec. 2, which provides:

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

The rules on damages in condemnation in Michigan are that the condemnee shall receive the fair market value of the property taken, at the time of the taking. *Silver Creek Drain District v Extrusions Division, Inc*, 468 Mich 367; 663 NW2d 436 (2003), *Michigan Consolidated Gas Co v Muzeck*, 8 Mich App 329; 154 NW2d 667 (1967). "Just compensation" is a legal phrase of art, and

> [t]hroughout our history and clearly by the 1960's, it was uncontroversial that a determination of 'just compensation' required the consideration of all the multiplicity of factors that go into making up value.

Silver Creek Drain District, 468 Mich at 377. That value necessarily depends upon the uses for which land is adapted and which are permitted:

> The market value of land or real estate is the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used . . . .

Consumers Power Co v Allegan State Bank, 20 Mich App 720, 744-45; 174 NW2d 578, 591 (1969). As under the United States Constitution, as interpreted by the United States Supreme Court, that value must include every "element entering into its cash or market value, as tested by its capacity for any and all uses . . . " *Silver Creek Drain District, supra*, 468 Mich 378; 663 NW2d 442 *quoting Searl v Lake Co School Dist No 2*, 133 US 553, 564; 10 S Ct 374, 33 LED 740 (1890), and 4 Nichols, Eminent Domain (rev'd 3d), Ch. 12, § 12.01, pp 12-2, 12-3. "Michigan's understanding of just compensation has been identical in all relevant particulars." *Silver Creek Drain District* at 378.

C. VALUATION OF LAND FOR JUST COMPENSATION

Property may be more valuable for a use different than that for which it is currently used. It is well settled that an owner may recover, as a measure of the damages for the taking of his land, that value, although the use is not already established. The consideration of the possibility of other uses, however, necessarily includes an evaluation of the likelihood of that higher and better use.

As this Court has held, "in the absence of the zoning ordinance, [the owners] would have the right to make any desired use of their premises not amounting to a nuisance." *Teglund v Dodge*, 316 Mich 185, 189; 25 NW2d 161, 163 (1946); *Lansing v Perry*, 216 Mich 23; 184 NW2d 473 (1921); *Anchor Steel & Conveyor Co v Dearborn*, 342 Mich 361; 70 NW2d 753 (1955). In other words, the first premise of fair market value is the highest and best use considering the property in its present condition and situation; it is those uses which create its value. However, because that value depends upon the "purposes . . . for which it is capable of being used," *Consumers Power Co v Allegan State Bank, supra*, 20 Mich App at 745, "land use regulations must be considered because

they restrict the uses to which the property may lawfully be devoted." *United States v 174.12 Acres of Land,* 671 F2d 313, 315 (CA 9, 1982).

As the court explained in *US v Meadow Brook Club*, 259 F2d 41, 44-45 (CA 2, 1958):[3]

> Just compensation compatible with the requirement of the Fifth Amendment is the fair market value of the condemned property just prior to the taking. *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266; 63 S.Ct. 1047, 87 L.Ed. 1390, *United States v. Miller*, 317 U.S. 369, 374; 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55; *McCandless v. United States,* 298 U.S. 342; 56 S.Ct. 764, 80 L.Ed. 1205. This evaluation should reflect not only the purpose for which the property has theretofore been used, but other uses which might render it more profitable. *Olson v. United States*, 292 U.S. 246; 54 S.Ct. 704, 709, 78 L.Ed. 1236. It would be improper to value the property as if it were actually being used for the more valuable purpose. But the extent that the prospect of demand for such use affects the market value while the property is privately held should enter into the calculation. *Olson v. United States, supra,* 292 U.S. 246, 255; 54 S.Ct. 704, 78 L.Ed. 1236. Obviously the more profitable operation must be one allowed by law to be carried out on the premises. Thus if existing zoning restrictions preclude a more profitable use, ordinarily such use should not be considered in the evaluation. *Westchester County Park Commission v. United States,* 2 Cir., 143 F.2d 688, certiorari denied 323 U.S. 726; 65 S.Ct. 59, 89 L.Ed. 583. On the other hand if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered in arriving at the proper value. This element, too, must be considered in terms of the extent to which the 'possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking.

The increased value attributable to demand for the more profitable use is not evaluated as a separate claim or substantive damage. Rather, it is a necessary part of the consideration of the damages by which the injury to the owner (that is, the taking of the land) are to

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[3]Cited in *State Hwy Comm'r v Eilander*, 362 Mich 697; 108 NW2d 755 (1961).

be measured. As the highest and best use for which property may fairly be used and valued must be considered in the context of restrictions on that use, the possibility of rezoning is part of the same calculation. Zoning is thus part of the measure of damages, not isolated as a separate consideration or element of substantive damage.

D. ZONING AND OTHER LAND USE RESTRICTIONS

The opinion of the Court of Appeals mistakes both the nature of zoning and its consideration in determining the fair market value of property to determine just compensation. The land taken is valued not only according to its current use but for other uses which might make it more valuable. In the absence of any land use restriction that might be any use for which it is adopted and for which there is a demand. *See, e.g, Teglund v Dodge, supra.* The constraint imposed by zoning must also include the evaluation of the potential to allow those other, more valuable uses.

In setting out a "comprehensive definition of 'market value,'" Nichols on Eminent Domain describes the factors in valuation:

> 'Fair market value,' for the purpose of evaluating land and improvements taken under the power of eminent domain, is the amount of money which, as of the date of valuation, an informed and knowledgeable purchaser, willing, but not obligated, to buy property would pay to an informed and knowledgeable owner, willing, but not obligated, to sell it. Consideration must be given to the following:
>
> (a) All uses for which the land is suited might be applied, including, but not limited to the present use or highest and best available use;
>
> (b) The existing zoning or other restrictions upon use, and the reasonable probability of a change in those restrictions; and
>
> (c) The period of time in which such sale could reasonably be effectuated.

4 Nichols on Eminent Domain (3rd revised edition) § 12.02[1], pp 12-70-12-72. Zoning is not separated. As described in *State Hwy Comm'r v Eilander*, 362 Mich 697, 699; 108 NW2d 755, 756 (1961), consideration of the possibility of other uses or of other zoning does not mean "that speculative future uses incompatible with existing zoning are to be assigned a valuation."

The evaluation of the uses to which the property is adapted and the effect of land use regulations was aptly described in the holding in *State Hwy Comm'r v Eilander*, 362 Mich 697, 699; 108 NW2d 755 (1961). This Court rejected an appraisal based solely on residential use for which the property was zoned, ignoring a pending rezoning to commercial use. The Court also rejected an appraisal based upon its use as commercially-zoned property. Rather, the Court explained:

> The determination of value in each case, we have also held, is not a matter of formula or artificial rule but of sound judgment and discretion based upon the relevant facts in the particular case. Here one of the relevant facts pertained to an already-pending modification of the zoning. This is not to say that speculative future uses incompatible with existing zoning are to be assigned a valuation. We look at the value of the condemned land at the time of the taking, not as of some future date. If the land is then zoned so as to exclude more lucrative uses, such use is ordinarily immaterial in arriving at just compensation. But, on the other hand, it has been held, 'if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered in arriving at the proper value.' This element, too, must be considered in terms of the extent to which the 'possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking [citations omitted].

Id., citing U.S. v Meadowbrook Club, supra.

In other words, the effect on value of the existing zoning and any other land use restriction must be evaluated from the perspective of a buyer evaluating the likelihood of establishing the highest and best use. Thus, in *Hartland Twp v Kucykowicz,* 189 Mich App 591; 474 NW2d 306

(1991), the owner contended that his land, though vacant and zoned for agricultural use, should be valued for multiple family residential use. That use would have required both rezoning and the township's cooperation in creating and maintaining a private sewage treatment facility to serve the development. The owner thus posited a value based on both a use not yet established and one not permitted by current zoning restrictions applicable to the land. The Court of Appeals acknowledged that if a reasonable possibility existed, absent the threat of condemnation, that these conditions to the more valuable use could have been met, they should been taken into consideration "in arriving at the value of the property on the date of taking." The Court of Appeals sustained the trial court finding that the property owner had failed to show that "his envisioned use of the land was reasonably possible." 189 Mich App at 597.

For the same reason, this Court has rejected evidence that a rezoning was later granted to show possibility of rezoning as a factor affecting just compensation:

> . . . evidence demonstrating the likelihood of a zoning modification, just like any number of circumstances that may affect a property's value on the open market may be relevant in determining just compensation. However, because just compensation must be calculated on the basis of the market value of a property on the date of the taking, the relevance of any such evidence is wholly dependent on whether, and how, the particular factor at issue would have affected market participants *on that date*. [Emphasis in original.]

Michigan Dep't of Transportation v Haggerty Corridor Partners Limited Partnership, 473 Mich 124, 136; 700 NW2d 380, 387 (2005).

Any other land use restrictions, such as use restrictions under state or federal wetland regulations, must be considered in the same fashion. *See, e.g., Berwick v State*, 107 App Div 2d 79; 486 NYS 2d 260 (1985); *Ford v Destin Pipeline Co, LLC*, 809 So2d 573, 579 (Miss 2000)

(upholding jury's view of land itself and extensive testimony regarding wetland and upland acres on property and difficulty or ease of obtaining a wetland mitigation permit in order to develop the property); *Louisiana v St. Charles Airline Lands, Inc*, 871 So2d 664 (La Ct App 2004) (trial court was entitled to consider testimony of experts in real estate appraisal and market analysis in determining likelihood that property owner would have received permits to develop wetlands, for purposes of determining just compensation); *U.S. v 52.60 Acres of Land*, 953 F2d 886 (CA 5, 1991) (In condemnation proceedings against undeveloped coastal wetlands property, trial court correctly weighed proposed alternative uses for clamshell mining or camp ground, although, "the government must walk a narrow path in arguing that regulatory restrictions decrease the value of property." 953 F2d at 894). That evidence, like zoning restrictions, "would tend to affect the market value of the property as of the date of taking," and is therefore relevant. *Dep't of Transportation v VanElslander*, 460 Mich 127; 594 NW2d 841 (1999). On the other hand, "where a private purchaser would not give substantial consideration to it, it should not be considered." *State Highway Comm'r v Minckler*, *supra*, 62 Mich App at 277-278.

As held by this Court in *In re Widening of Michigan Avenue*, 280 Mich 539, 548; 273 NW 798 (1937), this "determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant factors in a particular case" (as quoted in *MDOT v Frankenlust Lutheran Congregation*, 269 Mich App 570, 577; 711 NW2d 453, 458 (2006). Zoning and other land use restrictions, as they affect the value a private buyer would place on the land taken, are factors in determining damages, the value of the thing taken.

E. OMITTED PROPERTY OR DAMAGE: NOTICE OF CLAIMS

The owner is always entitled to the fair market value of his property as just compensation for what is taken by the government. How, if at all, does the Notice Statute change the consideration of land use regulations such as zoning?

In 1996, the Legislature amended the UCPA to, among other things, provide greater flexibility to the condemning authority and substantially enlarge the disclosures and exchange of information between the condemning authority and property owner. The amendments expanded the information available to the agency prior to filing a condemnation action, 1996 PA 474, § 1, MCL 213.55(2), 213.57(2), and the exchange of appraisal reports as part of the condemnation action including specific requirements as to their contents. 1996 PA 474, § 1, MCL 213.61.

The Notice Statute is part of the provision requiring that the condemning agency first "establish an amount that it believes to be just compensation for the property and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established." MCL 213.55(1).

The 1996 amendments added the provision that an owner who believes that the good faith written offer "did not include or fully include 1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation," must file a written claim with the agency or be barred from making the claim.

As noted above, the necessity of the claim in this case hinges upon the meaning of "1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation." As also discussed above, the meaning of just compensation for the taking of land in Michigan does not treat the possibility of rezoning, at issue in this case, as a separate item

of injury or damage, but rather as part of the measure of damages for the injury. Neither the legislative history nor the law of Michigan with respect to property or damage for which the right to just compensation may be claimed would change that result.

F. LEGISLATIVE HISTORY

As introduced in Senate Bill 778 of 1995 ("SB 778"), the bill did not include the provision in the form now found in subsection 5(3), MCL 213.55(3). Rather, it would have required an owner to provide the condemning agency with notice of a claim "that the agency is taking property other than that described in the final good faith written offer." That provision, as part of an amended section 11 of the UCPA, MCL 213.61, would have required that the parties complete and exchange appraisal reports 180 days after a complaint is filed unless the court extended that limit, but subject to notice of a claim for compensation for additional property:

> (A) If the owner claims that the agency is taking property other than that described in the final good faith written offer, the agency may take additional time as may be needed to appraise that additional property.

SB 778, Attachment 2, p 14, line 23.[4]

The legislative history shows that the Senate Committee on Local, Urban, and State Affairs adopted a substitute (S-1) for the bill. The substitute (S-1) removed the quoted language from section 11 and, for the first time, added the language now found in subsection 5(3), and introduced the phrase "items of compensable property or damage for which the owner intends to claim a right to just compensation," in place of "claims that the agency is taking property other than

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[4]As introduced, SB 778 also included the similar language adopted in amended section 9 of the UCPA, MCL 213.59, providing, in subsection (5)(c), that a court not delay or deny an agency's request for surrender of possession because of "an allegation that the agency should have included additional property in its good faith written offer." *Id.*, pp 13-14.

that described in the final good faith written offer."[5] The substitute (S-1) also introduced the penalty that the claim is barred if the owner fails to file a timely written claim under this subsection.

That same language appeared in the substitute (S-2) adopted by the full Senate and now appears in the statute.[6]

G. PROPERTY AND DAMAGE

The meaning of the phrase "compensable property and damage"as used in the statute has an established meaning in Michigan law. The addition of "damage" in the Legislature clarified the application of the phrase to the full range of just compensation in Michigan. The meaning of "damage" as established in Michigan law also makes clear the misapplication of the statute in this case.

As established in Michigan, prior to the adoption of the Notice Statute, the general rule of law is that, unless property is taken, the owner will not be compensated. However, when property is taken, an owner may also be compensated for claims for injury or damage to the property not taken. For example, where fixtures, as part of the property, pass to the condemning agency, the property owner must be compensated. If the owner chooses instead to remove the fixtures from the property taken by the agency, then the condemning agency must compensate the owner for the injury or damage incurred: "the difference in the market value of the fixtures in place the value of detaching and reattaching them." *In Re Condemnation of Private Property to Acquire Land for*

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[5]Attachment 3, pp 9-10, 17-18.

[6]Attachment 4, pp 9-10. The House and Senate journals and committee minutes do not specifically address the meaning of the phrases quoted, and amendments offered were sufficiently different to make any conclusion as to why they were or were not adopted difficult at best. Attachment 5.

Detroit Metropolitan Wayne Co Airport v William G. and Virginia M. Britton Trust, 211 Mich App 688, 695; 536 NW2d 598 (1995) explaining the application of *In Re Widening of Gratiot Avenue*, 294 Mich 569; 293 NW 755 (1940). Similarly, compensation must be paid for injury or damage to a business located on the condemned parcel of realty. *City of Detroit v Michael's Prescriptions*, 143 Mich App 808; 373 NW2d 219 (1985), citing *Grand Rapids and Indiana Art Co v Weiden*, 70 Mich 390; 38 NW294 (1888). In the case of both *Weiden* and *Michael's Prescriptions*, the property owners had used their property in lucrative businesses in which the locality and its surroundings had a bearing on its value:

> Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change . . . there may be cases where the loss for a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated.

143 Mich App at 812-813, *quoting Weiden*, 70 Mich at 395. In other words, there may be injury or damage for which compensation may be claimed, even though the government does not actually take the business for use as a going concern. *Id.* at 812. If the effect is to destroy the business altogether, damage may be recovered for that value; if the business can be transferred, the business owner may recover for certain business interruption expenses. *Id.* at 224, fn 2, citing *In Re Park Site on Private Claim 16*, 247 Mich 1; 225 NW 498 (1929).

The addition of the phrase "compensable damage" to the act thus follows the rules and language used by Michigan courts in describing compensation for the taking of private property: both property and compensable damage.

Those types of claims were specifically addressed by the Court after the amendment of the section at issue in *Novi v Woodsen*, 251 Mich App 614; 651 NW2d 448 (2002). There, the property owner did not make a claim, but rather sought to "reserve" a claim either for loss of the business or for business interruption expenses, and the Court held that the reservation was ineffective and the claim was therefore barred. In the instant case, no claim or reservation was made.

H. THE EFFECT OF THE UCPA ON JUST COMPENSATION

The procedures instituted in 1996 do not change the ultimate determination of just compensation under the Constitution. As outlined by the Court of Appeals in *MDOT v Frankenlust Lutheran Congregation, supra*, 269 Mich App at 576-77, the UCPA provides that tendering a good faith offer to purchase is a necessary precondition to the filing of a condemnation action to encourage negotiated purchases:

> Where such negotiations fail, however, the UCPA fulfills its constitutional purpose by requiring that just compensation for the property taken be determined by a trier of fact in a court of record.

MCL 213.63; see also, Constitution 1963, art. X, sec. 2. The Court in *Frankenlust Lutheran Congregation* held that the condemning authority therefore may introduce a later appraisal by the condemning authority different from that used to make the good faith offer to purchase. The result follows from the constitutional requirement of just compensation:

> this 'determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case.' Because those facts may change between the time of the good faith offer and the filing of the condemnation complaint, i.e., the date of valuation, the UCPA cannot be reasonably construed to prohibit a condemning authority from altering its pre-condemnation determination of just compensation. Indeed, the UCPA contemplates such changes by

> providing for the post-filing 'exchange of the agency's *updated* appraisal report, if any, and the owner's appraisal report.'

MCL 213.61(3) [underlined emphasis supplied; italicized emphasis by the Court]. As the Court further reasoned, the well-settled goal of just compensation is to ensure that the injured party is restored, at least financially, to the same position it would have been in if the taking had not occurred. Thus, while the tender of the good-faith written offer enables the agency to institute condemnation proceedings and take title, where it cannot reach agreement on purchase, neither the offer nor the appraisal on which it is based establishes the value of the property under the UCPA: "To the contrary, acquisition by condemnation is by trial *de novo* on the question of compensation [footnote omitted], in which it is the function and duty of the trier of fact to determine the value of the property taken." *St Clair Shores v Conley*, 350 Mich 458, 464; 86 NW2d 271 (1957).

I. THE OWNER'S INTEREST IN ZONING

In the instant case, the treatment of the "possibility of rezoning" is inconsistent with that structure of the UCPA and with the nature of zoning, its effect on the property, and the owner's interest in it. First, zoning may change at any time. Michigan zoning is legislative and subject to change by a local governing body whether at the request of the owner, a developer, or the local governing body or planning commission.[7] Second, and at least in part as a necessary result of the legislative nature of zoning, a property owner in Michigan has no vested interest in the existing ordinance governing the zoning for property, *e.g., Lansing v Dawley*, 247 Mich 394; 225 NW 500 (1929). An existing use may be continued in the face of a change in the zoning; a change in the

[7]2006 PA 110, Michigan zoning enabling act, sections 202, 305, 401, superseding MCL 125.584 (cities and villages); MCL 125.284 (townships); MCL 125.214 (counties) effective July 1, 2006.

zoning before the use is established will preclude that prospective use. The opinion of the court in *Schubiner v West Bloomfield Twp*, 133 Mich App 490; 351 NW2d 214 (1984) collected the cases establishing to that time the extent and nature of permits and work required to establish vested rights in a use in the face of a change in the zoning ordinance. That right, however, is in the use, not in the zoning. The owner has no protected interest in a rezoning: In *Health Twp v Sall*, 442 Mich 434; 502 NW2d 627 (1993), the owners failed to establish a right protected by Michigan law. The township board granted the owners' request to rezone the property to multiple family residential. Township residents opposed to the zoning change successfully petitioned for a referendum, returning the property to its original single-family residential classification. The issue lay in whether the owners had established the use before the referendum; as they had no interest in the zoning itself, they could have no claim for its loss.

Under Michigan law, a property owner cannot assert a right to compensation without any property interest. *Gerrish Twp v Esber*, 201 Mich App 532; 506 NW2d 588 (1993). Thus, in *Gerrish Twp, supra*, the property owner could claim no right to compensation for the loss of the right to use a sign on property he did not own and had no legal right to occupy. In sum, an interest in the "possibility of rezoning" cannot be a separate, compensable interest under Michigan zoning or property law.

J. REZONING AND THE PROPERTY INTEREST IN LAND

It is not the possibility of rezoning that is taken or that creates a right to compensation. Rather, it forms one of the factors to be considered in determining the value for just compensation purposes of land which is taken. Although the Court of Appeals opinion correctly

defines the "damage" for which a claim must be made, the possibility of rezoning forms part of the measure of damages, and no claim is required for the property owner to make it.

In sum, there is nothing in the legislative history, the addition of the word "damage," or the application of that term prior to this case to suggest that amendment was intended to change the treatment of a factor in the measure of just compensation for the taking of land.

In applying the statute as so amended, it is necessary to distinguish "damage" from "damages."[8] Black's Law Dictionary (7th Edition), at 393, defines "damage" and "damages":

> damage, *n.* Loss or injury to person or property <actionable damage resulting from negligence>.
>
> damages, *n. pl.* Money claimed by, or ordered to be paid to, a person as compensation for loss or injury <the plaintiff seeks $8,000 in damages from the defendant>.

That definition of "damage" is the one chosen by the Court of Appeals in its reported opinion in this case. The opinion of the Court of Appeals treats the "possibility of rezoning" claim as a substantive claim, that is, "damage," "not damages."

> Echo's claim is a 'possibility of rezoning' claim. A landowner is entitled to compensation for the 'possibility of rezoning' if 'a reasonable possibility exists, absent the threat of condemnation, that the zoning classification of the condemned property would have been changed. . . .' *Hartland Twp v Kucykowicz*, 189 Mich App 591, 596; 474 NW2d 306 (1991), citing *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). In other words, because the

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[8]In *Duronio v Merck & Co, Inc*, unpublished Michigan Court of Appeals opinion, docket no. 267003, June 13, 2006, 2006 WL 1628516, Attachment 6, the court quoted similar dictionary definitions:

> The word 'damage' is defined in Random House Webster's College Dictionary (1997) as 'injury or harm that reduces value, usefulness, etc.' While 'damages' refers to the 'estimated money equivalent for loss or injury sustained.'

> reasonable possibility of rezoning would have affected the price a willing buyer would have offered for the property before the taking, it is compensable if proved. *See, Dep't of Transportation v Van Elslander*, 460 Mich 127, 130; 594 NW2d 841 (1999).

269 Mich App 324, 328; 712 NW2d 168, 172 (2005). The Court rejects Echo's argument that the possibility of rezoning claim merely involves a valuation dispute, that is to say, the measure of damages for the loss of its land. The Court reiterates the view that it is a "claim . . . to just compensation for the loss of the value of the possibility of rezoning. . . . Thus, it is clearly a claim for compensable damage."

The property taken, and at issue, was the land condemned by the Drainage District.[9] The elements that go to its value are not separate claims or injuries. In *In Re Park Site on Private Claim 16, City of Detroit*, 247 Mich 1; 225 NW2d 498 (1929), the court rejected an analogous view of the taking of a leasehold. The property owner sought to recover its prospective profits for the expired term of the lease. The court rejected the claim, holding that "all of the damages recoverable in this case are included in the value of the leasehold interest for which the lessee has received payment." *Id.* at 1. The court explained:

> Where an entire leasehold interest is taken, it is a sensible and just rule that confines the damages to the fair market value of the lease, and, in case of exceptional circumstances where it has no market value, then the damages are the actual value. In estimating the value, it is proper to consider the location of the premises, with special adaptability to the business there being conducted, the length of time it has been established, its earnings and profits, the unexpired term of the lease, and every other fact that may affect its value. All of these matters go to enhance the value of the lease. They are not substantive elements of damages in condemnation proceedings.

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[9]Attachment 1, Plaintiff's appendix to Recorder of Law dated May 21, 2003, good faith offer by Carrier Creek Drainage District.

247 Mich at 4. In the same way, the possibility of rezoning goes to the value of the land; it is not a separate substantive claim or injury.

III. CONCLUSION

In the context of just compensation, the terms used in the Notice Statute by the Legislature have clear meanings. The responsibility of the property owner to give notice to the condemning agency when items of compensable property or damage were omitted from the good faith offer must be read in that context. The Court of Appeals decision artificially separates the possibility of rezoning from its proper context in the valuation of property. To compensate the owner when the government takes property, the value of property taken must consider the uses for which the land is suited, including, but not limited to, the present use or highest and best available use and to determine the potential for those uses, the existing zoning or other restrictions upon use, and the reasonable possibility of a change in those restrictions. The separation of those factors in valuing property for just compensation into disparate items of property or damage confuses the injury with the measure of the compensation for the injury, damage with damages.

Far from clarifying issues and creating an open exchange of information, the 1996 amendment as so read would have the opposite effect. The condemning agency would have an incentive to include as little detail on the elements of compensation in its good faith offer, and the property owner would have no choice but to include in its notice every conceivable factor that might affect the value and arguably might have been omitted from the condemning agency's offer. There can be no doubt that experienced eminent domain lawyers will develop a long, generic laundry list of factors of value which will be mechanically and routinely included in every property owner's notice. There is nothing in the legislative history or in the Michigan cases explaining just

compensation and the procedure for good faith offers that suggests such a reading and result. Notice to the condemning authority should not be required for consideration of the reasonable possibility of rezoning of the land taken in the condemnation action. Accordingly, the decision of the Court of Appeals should be reversed.

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